

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GARY KAVANAGH and LISA J.
KILIAN,

Appellants,

v.

SPOKANE COUNTY AIR POLLUTION
CONTROL AUTHORITY, CITY OF
SPOKANE

Respondent.

and

State of Washington
DEPARTMENT OF ECOLOGY,

Intervenor.

PCHB No. 89-127

ORDER GRANTING DISMISSAL

On September 28, 1989, Gary Kavanagh, a resident of the City of Spokane and Lisa J. Kilian, a resident of Spokane County, filed with the Pollution Control Hearings Board ("PCHB") a letter appealing Spokane County Pollution Control Authority's ("SCAPCA") August 31, 1989 issuance of an amended Notice of Construction and Application for

1 Approval ("permit") for a solid waste incinerator. On November 1,
2 1989 the Washington State Department of Ecology ("DOE") was granted
3 intervenor status.

4 The City of Spokane filed a Motion, Memorandum and documents in
5 Support of Dismissal on November 1, 1989. DOE filed its memorandum on
6 November 14, 1989. Appellants filed an Amended Notice of Appeal and
7 Memorandum which opposed dismissal on November 15, 1989. Spokane
8 filed its Memorandum in Response on November 21, 1989. Oral argument
9 was held on November 29, 1989 by telephone conference call.

10 By way of background, on February 23, 1989 after a one week
11 hearing on the merits, the PCHB issued Revised Final Findings of Fact,
12 Conclusions of Law and Order, PCHB No. 88-23 ("Order"). The Order
13 affirmed SCAPCA's issuance of a Notice to Construct for the same
14 incinerator, except subject to the following:

15 that dioxin and furan emissions as 2379 TCDD are
16 limited to the lesser of 4.5 ng/NM³ or the rate
17 emitted as revealed by the first two years of initial
18 monitoring, and that NO_x emissions (as NO₂) are to
19 be reduced by 40% to 228 ppmdv7 (3-hour average), 180
ppmdv 7 (annual average). The permit is remanded for
revision and reissuance in conformance with this Order.

20 Appellants' appeal of the amended permit contends that it was
21 unlawfully issued because:

- 22 1. the documentation relied upon by SCAPCA including the EIS has
23 to be amended or supplemented to consider the environmental
24 effects of the Thermal De-NO_x process and other new aspects
25 of the project; and

2. the County has failed to meet the statutory deadline for an updated Comprehensive Solid Waste Management Plan.

This remand led, in part, to SCAPCA's August 31, 1989 amended permit.

Respondent City's main argument in support of dismissal is that the PCHB does not have jurisdiction over the amended permit as SCAPCA undertook only ministerial non-discretionary actions in revising the permit to conform to the PCHB Order in 88-23. (Respondent's position also appears to encompass the position that the revised permit conforms to the PCHB Order and dismissal is appropriate.) It is respondent's position that the appellant's cause of action regarding the State Environmental Policy Act and EIS Compliance is before the Spokane County Superior Court in Citizens for Clean Air, et al. v. City of Spokane, et al., cause number 89-203800-0, and the PCHB should defer to that venue. In oral argument respondent's stated that the PCHB need not reach a decision on venue in order to grant dismissal. Respondent further contends that appellant's original appeal was defective as to form and therefore the matter should be dismissed. Respondent also argues that the Board has no jurisdiction over the Solid Waste Plan.

DOE contends that the Board does have jurisdiction to determine if the revised permit complies with PCBH No. 88-23. DOE takes no position on whether the revised permit does, in fact, comply. DOE

1 agrees with Respondent City that the Board has no jurisdiction over
2 the Solid Waste Management Plan.

3 Having reviewed the record in this case, and the Order in 88-23,
4 we find and conclude as follows:

5 I

6 The Pollution Control Hearings Board is a quasi-judicial entity
7 with only that jurisdiction provided by statute or as necessarily
8 implied. See, Human Rights Commission v. Cheney School District, 98
9 Wn.2d 118, 641 P.2d 143 (1982).

10 Appellants have cited no legal authority for the proposition that
11 the Board has jurisdiction over the issuance of Solid Waste Management
12 Plans, and we find none.

13 II

14 The amended permit of August 31, 1989 states as follows:

15 This letter is notification that Notice of Construction
16 and Application for Approval (NOC) no. 170, issued on
17 March 3, 1988, is hereby amended to include the
18 provisions of the Revised Final Findings of Fact,
19 Conclusions of Law and Order issued by the Washington
20 State Pollution Control Hearings board (PCHB) on
21 February 23, 1989, with one minor change.

22 The 228 parts per million, 3 hour average limitation on
23 nitrogen oxide emissions is changed to 225 parts per
24 million, 3 hour average.

25 III

26 The PCHB does have jurisdiction to determine if the amended
27 permit is consistent with the PCHB Order in 88-23. This is the sole

1 jurisdiction that the PCHB has in this instance. See, SAVE v. City of
2 Bothell, SHB 85-39. In so concluding, we note that neither the
3 original nor ^{the} amended SCAPCA permit requires a particular technology.
4 Instead, the permits specify emissions limitations. We also observe
5 that during the PCHB 88-23 hearing on the merits the issue of Thermal
6 DeNO_x was raised. See Finding of Fact XXII which stated in part:

7 Respondents have not provided any persuasive evidence
8 that NO_x removal will adversely affect the
9 incinerator's operation, or cause adverse environmental
impacts. Possible ammonia emissions can be limited.

10 Were the PCHB to have jurisdiction, at this stage, broader than
11 determining compliance with its previous Order remanding, such
12 jurisdiction would defeat the basic principle of finality in
13 litigation, and would allow circumvention of the statutory requirement
14 that appeals from PCHB orders be filed within 30 days.

15 V

16 The amended permit is somewhat stricter than the PCHB Order: i.e.
17 225 ppmdv7 versus 228 ppmdv7 (3 hour average). The 225 ppmdv7
18 provides more protection rather than less, and is consistent with the
19 228 ppmdv7 standard.

20 We find and conclude that the amended permit is consistent with
21 the PCHB Order in 88-23.

22 Because we reach this result, we do not address other issues
23 raised by Respondent City of Spokane.
24
25

ORDER

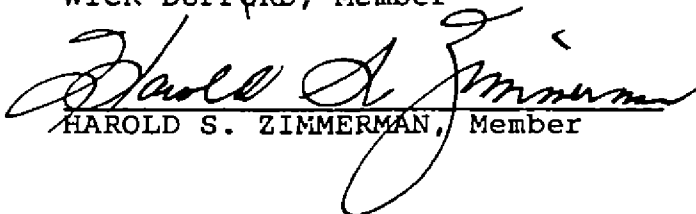
The Amended Notice of Construction is AFFIRMED and the appeal is
DISMISSED.

DONE this 7th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member